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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 359

ALLEGHANY CORPORATION, *et al.*,
Petitioners,

v.

MISSISSIPPI RIVER FUEL CORPORATION, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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July 15, 1966

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Alleghany Corporation and Empire Trust Company, as voting trustee of Alleghany's Class B Missouri Pacific stock, together with the individual Class B stockholders listed below,* petition for a writ of certiorari to review the judgment of the Court of Appeals for the Eighth Circuit entered in this case on April 19, 1966 in favor of the respondents, whose names are set out in full below.**

* Rose Slayton, Joseph M. Proskauer, Walter Mendelson, Alfred L. Rose, and Dorothy B. Rose.

** Mississippi River Fuel Corporation, William G. Marbury, Glenn W. Clark, D. B. Jenks, Sam B. Cook, James Lee Johnson, C. D. Peet, John C. Bolinger, Jr., James M. Kemper, Jr., and Missouri Pacific Railroad Company.

Opinions Below

The opinion of the Court of Appeals, No. 17,836, is reported *sub nom. Mississippi River Fuel Corp.* v. *Slayton,* 359 F.2d 106 (8th Cir. 1966), and is printed in Appendix B, *infra,* beginning at p. 8a. The memorandum opinion of the District Court is reported *sub nom. Slayton* v. *Missouri Pac. R.R.* at 233 F. Supp. 747 (E.D. Mo. 1964), and is printed in Appendix C, *infra,* beginning at p. 36a.

Jurisdiction

The judgment of the Court of Appeals herein was entered on April 19, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

The decision of the Court of Appeals below raises basic questions as to interpretation of § 5(11) of the Interstate Commerce Act, 49 U.S.C. § 5(11), which provides that the stockholder vote required to put into effect a consolidation of two or more carriers shall be "a majority, unless a different vote is required under *applicable State law,* in which case the number so required shall assent." (Emphasis added.)

In the suit below, Class B stockholders of the Missouri Pacific Railroad Company ("MoPac" herein), a Missouri corporation, claimed that a vote by class was required under the provisions of the MoPac charter and under Missouri State law, rather than by aggregate vote, to approve a plan proposed by the company's Class A stockholders for consolidation of MoPac with its 83%-owned subsidiary. The purpose and effect of the plan is to

destroy the Class B's earnings and liquidation rights, and enrich the Class A stockholders (who control MoPac's management) by more than $200,000,000 at the expense of the Class B, without any opportunity for a separate class vote by the affected Class B stockholders.

It being undisputed that a class vote would result in disapproval of the proposed consolidation, petitioners present the following questions:

1. In determining what stockholder vote is required to approve a proposed consolidation of carriers, should §5(11) of the Interstate Commerce Act be interpreted as establishing a majority aggregate vote as the "primary standard," and as providing that a different vote under "applicable State law" must be treated as an "exception," to be applied only if the State law is free from doubt?

2. Did the Court of Appeals err in declining to determine and apply so much of the applicable State law as it considered not "clearcut, free-from-doubt and positive" concerning the stockholder vote required to approve a railroad consolidation?

3. Are the provision of MoPac's charter fixing the respective rights of the Class A and Class B stockholders of MoPac to vote as separate classes and of the Missouri statute with respect to the stockholder vote required for adoption of a merger or consolidation of carriers, to be construed according to federal law* rather than the law of Missouri?

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* The federal policy expressions relied on by the Court of Appeals in the present case included (1) its own interpretation of § 5(11) of the Interstate Commerce Act, (2) the "National Transportation Policy" declared by Congress in the Transportation Act of 1940, and (3) this Court's decision in *Schwabacher* v. *United States,* 334 U. S. 182 (1948).

4. Did the Court of Appeals err in disregarding the Interstate Commerce Commission's consistent construction of §5(11) of the Interstate Commerce Act as requiring the stockholder vote called for by corporate charter provisions authorized under the law of the state of incorporation of the railroad?

Statutes and Rule Involved

The relevant provision of the Interstate Commerce Act, 54 Stat. 898, 908 (1940), 49 U.S.C.A. § 5(11)(1959), is set out in Appendix A, *infra*, beginning at p. 1a.

The relevant provisions of the Missouri General and Business Corporation Law, R.S. Mo. (1959) §§ 351.690, 351.420, 351.425 and 351.270, are set out in Appendix A beginning at p. 2a.

The relevant provisions of Rule 52.3 of the Interstate Commerce Commission, 49 C.F.R. § 52.3 (1963), are set out in Appendix A beginning at p. 5a.

Statement of the Case

This litigation stems from a plan proposed in December 1963 (S.1)* by the directors of MoPac and the directors of its 83%-owned subsidiary, Texas & Pacific Railroad Company ("T&P"), to merge and consolidate MoPac and T&P into a newly-created corporation, Texas & Missouri Pacific Railroad Company ("T&M"). The plan indisputably will substantially benefit Mississippi River Fuel Corporation ("Mississippi") (whose ownership of MoPac Class A stock comprises a majority of that class as well as a majority of all MoPac's outstanding stock),

* Numbers in parentheses preceded by capital "S" refer to pages in the Supplement to the Record on appeal; those preceded by capital "R" refer to pages in the Record on appeal; and those followed by lower case "a" refer to pages in the appendices in the back of this petition.

by transferring to the Class A stockholders all but 2% of the 53% equity interest in MoPac presently held by MoPac's minority Class B stockholders (45-46a; R. 30, 46-47). The litigation was precipitated by MoPac's announcement that the plan would be submitted for approval by MoPac's stockholders, voting in the aggregate, at MoPac's ensuing annual meeting (12-13a, 37a; R. 33, 53).

The Proceedings Below

Immediately following MoPac's announcement of its intention to submit the proposed plan to its stockholders voting in the aggregate, the petitioners herein commenced their actions (which were consolidated below for pretrial purposes) in the Federal District Court for the Eastern District of Missouri on the basis of diversity of citizenship,* seeking, *inter alia*, a judgment declaring that, under §5(11) of the Interstate Commerce Act and under applicable law of Missouri, the affirmative votes of separate majorities of the holders of both MoPac's Class A and Class B stocks would be required for assent to the proposed plan.

The defendants MoPac and Mississippi moved to dismiss the complaint insofar as it sought declaratory relief, on the ground that it failed to state a claim upon which relief could be granted. The District Court denied the motion, holding that under MoPac's Amended Articles of Association and the applicable Missouri statutes, the assent of separate majorities of each of MoPac's two classes of stock was required for approval of the proposed plan in accordance with the requirements of §5(11)

* Plaintiffs are citizens of Maryland and New York. Defendants are citizens of Missouri, Delaware, Texas, Louisiana, and Oklahoma.

of the Interstate Commerce Act (44-46a). The Court of Appeals entertained defendants' appeal from the District Court's order upon certification by the latter under 28 U.S.C. 1292(b) that it presented a controlling question of law the immediate review of which might materially advance the ultimate determination of the litigation (9a).

The Court of Appeals, conceding that there was an "applicable State law" (29a) but stating that it was uncertain whether a class vote was required thereunder, did not resolve that issue (31a). Instead, it held that the "National Transportation Policy" requires §5(11) to be interpreted as establishing a majority aggregate vote as "the primary standard," to which a class vote represents "the exception and not the rule," and that accordingly when doubt exists as to the applicable State law, §5(11) requires that it be resolved "on the side of those provisions of the statute which bespeak the rule and not on the side of those which provide the exceptions." (17a, 23a, 34a)

The Background of the Litigation

As of 1963 Mississippi owned 1,071,895 of the total of 1,849,576 MoPac Class A shares outstanding. Alleghany Corporation beneficially owns, through Empire Trust Company as voting trustee, in excess of 20,000 of the total of 39,371 MoPac Class B shares outstanding. Both classes are entitled to one vote per share of stock. (10a; R. 24, 26, 28, 30)

Both classes, and the rights pertaining to each, are the product of the fourth and final plan of reorganization of MoPac under Section 77 of the Bankruptcy Act, approved by the ICC on July 29, 1954 (*Missouri Pac. R.R. Reorganization,* 290 I.C.C. 477) and approved by the United States

District Court for the Eastern District of Missouri the following year, 129 F. Supp. 392 (E.D. Mo.), *aff'd*, 225 F. 2d 761 (8th Cir. 1965), *cert. denied*, 350 U. S. 959 (1956). The $100 stated value Class A stock was issued to MoPac's former holders of its $100 par value cumulative preferred stock on the basis of one share of $100 stated value Class A for each share of old preferred and one additional Class A share for each $100 of dividends accumulated thereon.

The ICC found that thereby the former preferred stockholders were fully compensated and held that they were not entitled to participate in the equity of the reorganized corporation beyond the $100 stated value of their Class A stock (290 I.C.C. at 597; R. 51; 42-43a). All the (then small) remaining equity value of the reorganized railroad was awarded to the former common stockholders in the form of Class B stock, on the reduced basis of one share of Class B stock for every twenty shares of old common stock (42a).

The Class A stock, as approved by courts and Commission and stockholders, has a limited equity participation of $100 per share. It is entitled to dividends, when declared, of up to $5.00 annually before any dividends can be declared for the Class B. The Class B stock is entitled to dividends in any amount the directors may declare after $5.00 per share has been paid on the Class A in any given year. The Class B is "entitled . . . to all residual earnings after payment of dividends on the new Class A stock." (290 I.C.C. at 600; R. 27, 51; 42-43a)

Having thus set this ceiling on the participation rights of the Class A stock, the Commission directed that the new company should be without power to alter it without the separate approval of the Class B stockholders (290 I.C.C. at 598, 665; R. 51). In accordance with the Com-

mission's specific directive, MoPac's Articles of Association were therefore amended to provide:

> "(3). The Company shall not, without the consent . . . of the holders of record of at least a majority of the number of shares of the Class A Stock then outstanding and at least a majority of the number of shares of the Class B Stock then outstanding . . . (c) alter or change the preferences, qualifications, limitations, restrictions and special or relative rights of the Class A Stock or of the Class B Stock or (d) amend or eliminate any of the provisions of this paragraph (3)." (12a, 38-39a)

The Proposed Plan of Consolidation

On December 3 and 4, 1963, MoPac's directors (all elected by Class A stockholders) and its 83%-owned subsidiary, T&P,* voted to consolidate MoPac and T&P into T&M, a wholly-owned Delaware corporation created for the purpose of the proposed consolidation. The consolidated company would have a single class of $25 par value common stock to be issued equally to MoPac Class A and Class B stockholders on the basis of four shares of the new T&M common for each share of MoPac Class A and for each share of MoPac Class B.

The impact of the consolidation plan upon the rights of the Class B stockholders would be disastrous. Although the equity attributable to the Class B was small when the reorganization plan was approved in 1954, the railroad has since prospered with the result that the value of the Class B has grown enormously. As of September 30, 1963

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* The chairman of the board and the president of MoPac are also the chairman of the board and the president of T&P; while the chairman of the board of Mississippi, MoPac's controlling stockholder, is also chairman of MoPac's executive committee and a member of the executive committee of T&P. (See MoPac merger application, pp. 6-8, 17, in I.C.C. F.D. No. 22951.)

(the end of the last quarter preceding the action of MoPac's board), the equity of the Class B stock was $5,280 per share (or a total of $209,763,642) as compared with the Class A's limited preference participation of $100 per share (or a total of $184,957,600).* The plan concocted by the Class A-elected management would transfer $201,846,048 of the Class B's equity to the Class A stockholders and thus shrink the Class B's equity from $209,763,642, or $5,280 per share, to $7,917,594, or $198 per share. It would hand over to the Class A stockholders an unrestricted 98% participation in equity, would eliminate the full participation in residual equity which the Commission granted to the Class B stock and leave its equity participation permanently frozen at 2% (45-46a; R. 31-32, 53).

The effect on MoPac's Class B stockholders would be the same as if MoPac were simply to recapitalize by issuing a single class of $25 par value stock on a four-for-one basis equally to its present Class A and Class B stockholders.

In January 1964, MoPac and T&P filed their joint application with the Interstate Commeree Commission for an order under §5(2) of the Interstate Commerce Act, 49 U.S.C. §5(2), authorizing the proposed consolidation. In this application it was stated that the proposed

* MoPac's Annual Report for the year 1965 shows that as of December 31, 1965, the Class B's share of MoPac's residual net worth (after satisfaction in full of the Class A's preferential rights on liquidation) had increased to $245,362,000, or $6,234 per Class B share.

The Class A stock, which is listed on the New York Stock Exchange, is currently trading at around $85 per share. The Class B stock, which is not listed, traded at $1,725 bid, $1,825 asked, on January 31, 1966. (On April 20, 1966, the day following the Court of Appeals' decision below, the bid price for Class B stock fell to $625.)

plan would be submitted to the shareholders for approval under §5(11) of the Act, 49 U.S.C. §5(11), by an aggregate or collective vote of the shareholders (as distinguished from a class vote) at the annual meeting in May 1964.* So far no action has been taken by the Commission on this pending application.

The Interstate Commerce Act and the "Applicable State Law"

As a railroad carrier subject to the provisions of the Interstate Commerce Act, MoPac must obtain ICC approval under § 5 of that Act before the proposed plan of consolidation can be put into effect. Section 5(11) of the Act provides that a plan approved by the Commission can be put into effect only if it is assented to by the stockholders of the carriers involved, and that the stockholder vote required for such assent shall be a majority "unless a different vote is required under applicable State law" (1a).

Both the District Court and the Court of Appeals found Chapter 351 of the Revised Statutes of Missouri (1959) (the General and Business Corporations Law) to be the "applicable State law" for the purpose of determining the stockholder vote required to adopt the proposed consolidation (41a, 29a). Section 425 of Chapter 351 requires the approval of "at least two-thirds of the outstanding shares entitled to vote" of each corporation in order to adopt a plan of merger or consolidation (3a, 29a). However, Section 270 of the same chapter additionally provides:

> "Whenever with respect to any action to be taken by the stockholders of a corporation the articles of incorporation require the vote or concurrence of the holders of a greater portion of the shares, or of any class or series thereof, than required by this

* After commencement of the action below, this decision was deferred pending the final determination of this action.

> chapter with respect to such action, the provisions of the articles of incorporation shall control this section." R.S. Mo. § 351.270 (1959). (2a, 30a)

The District Court held that, under the above section, Article VII(D)(3) of the MoPac Articles—which requires a majority vote of each class to approve any proposal to "alter or change the preferences . . . and special or relative rights of the Class A Stock or the Class B Stock"—controls, and that approval of a majority of MoPac's Class B stockholders, voting as a class, would be required to put the proposed consolidation into effect (41a). It declared:

> "The proposed consolidation . . . seems so plainly and obviously to alter and change the preferences, qualifications, limitations, restrictions and special and relative rights of the Class A and the Class B shares as not to require discussion. It matters not to whose advantage the plan accrues nor whether the plan be fair or unfair. The question is whether the two classes' relative rights, restrictions and limitations are to be altered and changed. It is patent that alteration and change of relative rights, preferences and limitations and restrictions in respect to dividends and upon dissolution are inherent in the plan for the exchange of the two classes of stock for identical common stock in the proposed new company." (44-45a)

The Court of Appeals, however, stated that it perceived "no clearcut, free-from-doubt and positive answer in these Chapter 351 sections to the issue of class vote under Missouri law" and that it was "not prompted to conclude, with any assurance" that Section 351.270 "demands class voting if the articles seem to require it." (31a) Rather

than resolve this question, however, it turned to § 5(11) of the Interstate Commerce Act for guidance, stating:

> "But MoPac's Articles do not stand alone. Hovering over them, as we have indicated, is § 5(11)." (26a)

The Court of Appeals then concluded that in view of the "National Transportation Policy" (17a, 34a) and this Court's "emphasis" in *Schwabacher* v. *United States** and other cases on "the basic supremacy of federal law" (18-20a), a majority vote constitutes the "primary standard of application" (23a), and that its doubt must be resolved "on the side of those provisions of [§ 5(11)] which bespeak the rule and not on the side of those which provide the exceptions" (34a).

The Court of Appeals never attempted to resolve the meaning of the applicable Missouri law prevailing in that State. Instead, as it made clear, the Court of Appeals disposed of its doubts concerning the Missouri law by reference back to federal law (35a).

The Reasons for Granting the Writ

Review by this Court of the decision below is essential because:

1. The Court of Appeals has committed egregious errors of far-reaching consequence in an important ruling with respect to the stockholder vote required to effectuate railroad and other carrier mergers and consolidations.

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* 334 U.S. 182 (1948).

A decision by this Court establishing the principles to be followed in the construction of § 5(11) of the Interstate Commerce Act, 49 U.S.C. § 5(11), and in the application of state law thereunder will furnish guidance both to other carriers and to the Interstate Commerce Commission in the disposition of the numerous and far-reaching merger plans, consolidations and sales currently coming before it, including the proposed consolidation which is the subject of this petition.

The Court of Appeals has construed § 5(11) of the Interstate Commerce Act to mean the opposite of what it clearly says. This section provides a federal rule of a simple majority vote for approval of a merger plan only in the contingency where "applicable State law" does not provide for "a different vote." Under the decision below, however, § 5(11) is interpreted as imposing a simple majority vote as the "primary standard" and resort to State law is to be the "exception and not the rule" and is characterized as a "departure from this [primary] standard." (23a) If anything, the "primary standard" prescribed by § 5(11) is "applicable State law." The practical effect of the decision in the instant case is to deprive the Class B stockholders of the protection of a separate class vote guaranteed them in the MoPac charter at the instance of the Interstate Commerce Commission and approved by the United States District Court for the Eastern District of Missouri as part of the final plan of reorganization of MoPac in 1955.

2. A decision by this Court as to the interpretation of § 5(11) of the Interstate Commerce Act will determine the extent to which § 5(11) preserves for stockholders the class voting protection of corporate charters under appli-

cable State law, explicitly recognized and reserved from federal power stated in this Section to be otherwise exclusive and plenary. Similar class vote provisions in the statutes of other states and in the charters of other carrier corporations promise to continue to raise the same issue (see Appendix E, *infra*, p. 49a). The questions presented for review are, therefore, of a recurring nature. A final decision by this Court now is therefore essential, as the issues involved bear directly upon the procedures requisite under the Interstate Commerce Act to the effectuation of railroad and other carrier mergers throughout the nation.

3. The decision of the Court of Appeals directly conflicts with the uniform administrative practice of the Interstate Commerce Commission on the question of stockholder approval (see *infra*, pp. 20-22).

4. The Court of Appeals' misconstruction of §5(11), together with its dismissal of the pertinent §351.270 of the applicable State statute as not clear, has led the Court to a decision in contradiction both of §5(11) and of the State statute:

Although both courts below found that "Chapter 351 [of the General and Business Corporations Law of Missouri] has application to the proposed plan" (41a, 29a, 34a), the Court of Appeals failed to construe this statute according to the law of the State of Missouri. Finding itself in doubt as to the interpretation and effect to be given to the section of this applicable state law which makes a class vote provision in a corporate charter controlling (§351.270), it resorted to considerations of federal law (which have no application) to resolve its doubts (17-20a, 34a). Neither Congress' declaration of the

National Transportation Policy (relied upon by the Court of Appeals) nor the provisions of the Transportation Act itself evidence, expressly or impliedly, any intent to alter the meaning of the "applicable State law," which §5(11) expressly reserves as the law governing the stockholder vote required; and this Court's decision in *Schwabacher* v. *United States,* 334 U. S. 182 (1948), also relied upon by the Court of Appeals, did not provide any basis for interpreting "applicable State law" other than according to the law of the State involved.

The foregoing errors led the Court of Appeals to an ambiguous and untenable result in its construction of both §5(11) and of the applicable State statute. Having found Chapter 351 of the Missouri statutes to be the "applicable State law," the court was placed by §5(11) under a clear duty to construe and apply Chapter 351 in its entirety rather than to avoid sections (such as §351.270) because it found them difficult to construe. Nothing in §5(11) permitted the court to divorce §351.425 of the Missouri statute, which it found no difficulty in construing, from §351.270, with its "provocative [class vote] provisions" (see 29-30a). Nor was the court entitled to disregard §351.270 in favor of the simple majority vote referred to in §5(11), which Congress intended solely as a contingent stop-gap, to be applied only if no applicable State law existed. Nor was the court justified in construing §351.270 according to federal standards in the light of the "National Transportation Policy," rather than according to principles of State law.

If the State statute had been construed in accordance with State law and policy, there can be no doubt that the court would have affirmed the District Court's interpretation of the State statute as requiring a class vote. See *Williams* v. *United States,* 341 U. S. 97, 100 (1951).

It is respectfully suggested that the Court of Appeals' opinion reversing the findings of the District Court on the applicable Missouri law is in disregard of its duty to determine and apply applicable State law under §5(11).

5. In the instant case, consideration by this Court now of this question may save the waste of thousands of hours of Commission and parties' time in the form of unnecessary Commission proceedings on the proposed consolidation plan. At the present time, no effort on the part of the ICC has yet been expended.* By contrast, for example, the proceedings which culminated in the ICC's recent rejection of the Great Northern, Northern Pacific, Chicago, Burlington & Q. merger fill 36 quarto volumes, list 123 parties of record, and required four years of hearings recorded on 15,347 pages (not counting exhibits) (I.C.C. F.D. No. 21478). A similar mammoth proceeding is likely in the instant case, complicated as it is by the extraordinary nature of MoPac's capital structure and the one-sided nature of its plan. All this would prove unnecessary if immediate review by this Court determined that in any event a class vote would be required.

6. While the Court of Appeals appears to have been under the impression that its decision disfranchising the Class B stockholders despite the explicit protection given them in the MoPac charter and under applicable Missouri law to vote as a separate class is, if erroneous, still open to court review following action by the Commission on the proposed plan (34a), we respectfully submit that such is not the case, and that an attempt to review the Court of Appeals' decision on the voting rights issue in a statutory

* The ICC record of proceedings on MoPac's application occupies a single volume containing copies of the application and court proceedings. I.C.C. F.D. No. 22951.

court after Commission action on the proposed plan would be met with a plea of res judicata. Accordingly, if there is to be review of the Court of Appeals' decision on the voting rights issue, it must be by this Court and at this stage of the proceedings.

The foregoing considerations emphasize the importance of the questions presented by this petition, none of which has yet been decided by this Court. Those questions are unavoidably raised by the following errors committed by the Court of Appeals:

The Errors Below

(1) The "Primary Standard" Error

Section 5(11) of the Interstate Commerce Act provides that although the authority conferred on the Commission over railroad mergers and consolidations is exclusive and plenary, such mergers and consolidations can be accomplished only

> "(with the assent, in the case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, of a majority, *unless a different vote is required under applicable State law, in which case the number so required shall assent,* of the votes of the holders of the shares entitled to vote. . . .)" (Emphasis added.)

The language of § 5(11) is clear: If applicable State law requires a different vote from the majority vote provided by § 5(11), then the State law governs and the number so required "shall assent" before the plan can be adopted.

The Court of Appeals, however, stood § 5(11) on its head and erroneously concluded that

> ". . . it is evident that the primary standard of application is a vote of the majority of all the vot-

> ing shares. The statute speaks, in the first instance, 'of a majority . . . of the votes of the holders of the shares entitled to vote'. Departure from this standard is, then, the exception and not the rule." (23a)

(2) The "National Transportation Policy" Error

In support of its misreading of the clear language as to the voting standard in §5(11), the Court of Appeals relied on the "National Transportation Policy" and this Court's reference in *Schwabacher* v. *United States,* 334 U. S. at 192-98, to "the basic supremacy of federal law" contained in the Act (17a, 18-20a).

Indeed, the Court of Appeals declared that the proper interpretation of the applicable Missouri law was irrelevant because the necessity of separate class votes depended on §5(11) and the national transportation policy. In response to petitioners' argument that the court below should follow the District Court's interpretation of Missouri law, the Court of Appeals held:

> "The appellees assert that, in any event, the district court's conclusion was a permissible one upon a doubtful question of state law. The question here, however, is a matter which primarily concerns the interpretation of §5(11). This is a federal statute. Despite its interplay with the Missouri law, our difference with the district court relates to this statute and the national transportation policy." (35a)

The Court of Appeals thus bottomed its decision four-square on federal law, *i.e.,* §5(11) and the "national transportation policy."

However, Congress, in its declaration of the "National Transportation Policy," stated that one of its purposes was "to cooperate with the several States and the duly au-

thorized officials thereof" (17a; 54 Stat. 898, 899 (1940), 49 U.S.C.A. preceding §1 (1959)); and nothing in that declaration refers to the stockholder vote required to adopt a merger or consolidation, or is in conflict with Congress' simultaneously-enacted provision in §5(11) itself to the effect that the vote should be determined by "applicable State law."

Furthermore, in *Schwabacher* this Court was not construing the application of a provision of the Act expressly adopting "applicable State law." It was dealing with an entirely different question, namely, the Commission's exclusive jurisdiction under §5(2)(b) of the Act to determine the fairness of the proportion of corporate capital being distributed to dissenting stockholders under a merger plan rather than leaving this to determination under State appraisal laws.

Nowhere in *Schwabacher* did this Court cast any doubt upon the express legislative statement in §5(11) that "applicable State law" shall control the vote necessary for stockholder adoption of a merger or consolidation. On the contrary, it specifically noted that, in addition to the condition of ICC approval for adoption of a railroad merger, there is the further condition of the

> "assent of a majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote.' (§ 5(11).) *When these conditions have been complied with,* the Commission-approved transaction goes into effect without need for invoking any approval under state authority. . . ." 334 U. S. at 194. (Emphasis added.)

The merger involved in *Schwabacher* was in fact adopted by stockholder vote in accordance with the State laws

applicable to the carriers being merged. As the dissent there noted,

> "The Chesapeake & Ohio is chartered by Virginia, the Pere Marquette by Michigan. The laws of Virginia and Michigan respectively determine the conditions under which each may combine with other corporations. The votes of sufficient stockholders of these two corporations to satisfy the laws of their respective States were in favor of . . . [the plan]." 334 U. S. at 202.

(3) The Error of Disregarding the Consistent Construction of Section 5(11) by the ICC

The Court of Appeals disregarded rules and decisions of the Interstate Commerce Commission consistently interpreting §5(11) of the Act as requiring the stockholder vote prescribed by a carrier's charter and by-laws adopted under the laws of the State of its incorporation. See Commission Rule 52.3, which was promulgated on October 31, 1940, shortly after §5(11) was enacted (reprinted in Appendix A, *infra*, pp. 5-7a).

The Commission has consistently required the carrier to show that a proposed merger, consolidation, or sale of assets has been approved by the vote required by the carrier's charter and by-laws. *E.g., Gulf, M. & O.R.R. Purchase,* 275 I.C.C. 197, 200 (Div. 4, 1949). And the Commission has also consistently required a showing of approval by a class vote where this was required either by state statute or the carrier's charter. See *Missouri Pac. Control of Chicago & E. Ill.,* I.C.C. F.D. No. 21755, report of hearing examiner (Sept. 26, 1963) pp. 128-29; *Norfolk & W. Ry. Merger,* 307 I.C.C. 401 (Div. 4, 1959).

The consistent construction of a statute by the administrative agency charged with its enforcement is entitled to great weight. *Maintenance Employees* v. *United*

States, 366 U. S. 169, 179 (1961); *FTC* v. *Mandel Bros.,* 359 U. S. 385, 391 (1959); *Review Comm.* v. *Willey,* 275 F.2d 264, 272 (8th Cir. 1959), *cert. denied,* 363 U. S. 827 (1960).

The issue presented here is not an isolated one, but exists potentially under the laws of a number of states. Statutory mandates for class voting when specified in the corporate charter and statutory requirements for class voting on mergers where the rights of classes of stockholders will be affected are not confined to Missouri statutory law or to MoPac's charter provisions. The statutes of eleven states to the same effect are cited in Appendix E(49a).

It is worthy of note that class vote requirements under these state statutes were complied with in the following recent railroad merger cases:

Seaboard Air Line—Atlantic Coast Line Merger, I.C.C. F.D. No. 21215 (approved Dec. 2, 1963), application p. 18;

Norfolk & W.—The Virginian Merger, I.C.C. F.D. No. 20599, 307 I.C.C. 401, 415 (Div. 4, 1959);

Norfolk & W.—New York, Chi. & St. L. Merger, I.C.C. F.D. No. 21510 (pen'g), application p. 20;

Erie-Delaware, L. & W. Merger, I.C.C. F.D. No. 20707 (approved Sept. 13, 1960), report of hearing examiner (Sept. 26, 1963) pp. 128-29;

C & O—Pere Marquette Merger, I.C.C. F.D. No. 15228.

It is further worthy of note that in the pending recent merger applications of *Chicago & N.W.-Chicago Great W.,* I.C.C. F.D. No. 23388, and of *Chicago & N.W.-Chicago,*

Milwaukee & St. P., I.C.C. F.D. No. 24182,* class vote requirements in the charters of the railroads involved were duly complied with.

There is no sound basis for the Court of Appeals' doubts as to the applicability of Article VII(D)(3)(c) of MoPac's charter to a merger or consolidation. The Article is all-inclusive. It broadly prohibits, unless sanctioned by a class vote, *any* corporate action which will alter or change the preferences or relative rights of MoPac's two classes of stock. There is no dispute that the result of the proposed consolidation here would be to alter drastically the relative rights and preferences of the Class B stock vis-a-vis the Class A (see 44-45a).

The class vote requirements of Article VII(D)(3)(c) are authorized by §351.270 of the Missouri statutes. The plain language of that provision states that a charter vote requirement "shall control" whenever the charter requires the vote of a greater portion of the shares "or of any class or series thereof" than is otherwise required by the statute (2a).

(4) The Error of Declining to Determine the Applicable State Law

Under §5(11), the court below was under a duty to determine whether there was an "applicable State law" and, if so, what vote was required thereunder. The Court of Appeals agreed with the District Court that Chapter 351 of the Missouri Statutes (the "General and Business Corporations" law) applied here (29a). It also found that §351.425 of that law requires approval of a merger or consolidation by at least two-thirds of the outstanding shares entitled to vote (29a).

* Ex. B-1 to joint merger application, pp. 47, 51.

Although the District Court, carrying out its duty under §5(11), had also found that §351.270 of the same chapter authorizes a corporate charter to superimpose a class vote, and that Article VII(D)(3)(c) of MoPac's charter requires such a class vote in the instant circumstances (41a), the Court of Appeals simply expressed itself as being in doubt as to (1) whether §351.270 of the Missouri statute authorizes a corporate charter to require a class vote, and (2) whether Article VII(D)(3)(c) of MoPac's charter requires a class vote to approve the corporate action here proposed (31a, 26a).

The Court of Appeals nowhere attempted to resolve its uncertainties as to the meaning of §351.270 within the context of Missouri law, but instead simply side-stepped this task. After inconclusively noting that "these opposing points of view as to MoPac's Articles are not easily resolved" (26a) and that "we perceive no clearcut, free-from-doubt and positive answer in these chapter 351 sections to the issue of class voting under Missouri Law" (31a), the court below simply abjured its task under §5(11) of finding and applying the applicable State law by "conclud[ing] that the MoPac Articles and the Missouri railroad and business corporation statutes do not provide material which carries us far enough," and holding that:

> "We are impressed with the significance of the national transportation policy and its emphasis on railroad consolidation, with the stated exclusive and plenary character of §5(11), and with its consequent preemptive nature. All this compels us, when we entertain doubt for the contrary result, as we do here, to resolve that doubt on the side of those provisions of the statute which bespeak the rule and not on the side of those which provide the exceptions." (34a)

Instead of resolving its doubts by construing and finding the Missouri law, the Court of Appeals held that where it entertained doubts as to the true intent of the Missouri law, it would resolve its doubts by reference back to the federal statute and the contingent voting provisions therein, which it incorrectly treated as the "general standard."

CONCLUSION

For the reasons given we pray that the writ be granted.

BRECK P. MCALLISTER,
Attorney for Petitioners Alleghany Corporation and Empire Trust Company

WILLIAM E. HAUDEK,
Attorney for Petitioners Rose Slayton, Joseph M. Proskauer, Walter Mendelson, Alfred L. Rose, and Dorothy B. Rose

GRANVILLE WHITTLESEY, JR.,
THEODORE S. HOPE, JR.,
G. CARROLL STRIBLING,
BEN VINAR.

July 15, 1966.

APPENDIX A

Statutes and Regulations Involved

Section 5(11) of the Interstate Commerce Act, 54 Stat. 899, 908 (1940), 49 U.S.C.A. §5(11) (1959):

Plenary nature of authority under section. The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power (with the assent, in the case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, of a majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation at a regular meeting of such stockholders, the notice of such meeting to include such purpose, or at a special meeting thereof called for such purpose) to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority; and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through

such transaction. Nothing in this section shall be construed to create or provide for the creation, directly or indirectly, of a Federal corporation, but any power granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State.

Missouri General and Business Corporations Law, R.S. Mo. (1959), 17 Mo. Stats. Anno. § 351 (Vernon's 1952):

351.270. Vote of concurrence of shareholders shall be controlled by articles of incorporation, when

Whenever with respect to any action to be taken by the stockholders of a corporation the articles of incorporation require the vote or concurrence of the holders of a greater portion of the shares, or of any class or series thereof, than required by this chapter with respect to such action, the provisions of the articles of incorporation shall control this section. (L. 1943 p. 410 §168)

* * * *

351.420. Plan of merger or plan of consolidation shall be submitted to vote at meeting of stockholders

The board of directors of each corporation, upon approving such plan of merger or plan of consolidation, shall, by resolution, direct that the plan be submitted to a vote at a meeting of shareholders, which may be either an annual or a special meeting. Notice of such meeting shall be given as provided in section 351.230. Such notice, whether the meeting be an annual or special meeting, shall state the place, day, hour, and purpose of the meeting, and

a copy or a summary of the plan of merger or plan of consolidation, as the case may be, shall be included in or enclosed with such notice. (L. 1943 p. 410 §64)

• • • • •

351.425. Voting by shareholders on plan for merger or consolidation

At each such meeting a vote of the shareholders entitled to vote thereat shall be taken on the proposed plan of merger or consolidation. The plan of merger or consolidation shall be approved upon receiving the affirmative vote of the holders of at least two-thirds of the outstanding shares entitled to vote at such meeting, of each of such corporations.

• • • • •

351.690. Applicability of this chapter to existing corporations

The provisions of this chapter shall be applicable to existing corporations as follows:

(1) Those provisions of this law requiring report, registration statements, antitrust affidavits, and the payment of taxes and fees, shall be applicable, to the same extent and with the same effect, to all existing corporations, domestic and foreign, which were required to make such reports, registration statements and antitrust affidavits, and to pay such taxes and fees, prior to the enactment of this law;

(2) No provisions of this law, other than those mentioned in subdivision (1) shall be applicable to banks, trust companies, insurance companies, building and loan

associations, savings bank and safe deposit companies, mortgage loan companies, and non-profit corporations;

(3) Only those provisions of this law which supplement the existing laws applicable to railroad corporations, union stations, co-operative companies for profit, credit unions, street railroads, telegraph and telephone companies, booming and rafting companies and exposition companies, and which are not inconsistent with, or in conflict with the purposes of, or are not in derogation or limitation of, such existing laws, shall be applicable to the type of corporations mentioned above in this subdivision (3); and without limiting the generality of the foregoing, those provisions of this chapter which permit the issuance of shares without par value and the amendment of articles of incorporation for such purpose shall be applicable to railroad corporations, union stations, street railroads, telegraph and telephone companies, and booming and rafting companies, and those provisions of this law mentioned in subdivision (1) will apply to all corporations mentioned in this subdivision (3).

(4) All of the provisions of this law to the extent therein provided shall apply to all other corporations, existing under prior general laws of this state and not specifically mentioned in subdivisions (1), (2) and (3) of this section.

Appendix A

Section 52.3 of the Regulations of the Interstate Commerce Commission, 49 C.F.R. § 52.3 (1963):

§52.3 Required exhibits.

(a) There shall be filed with the original application and as a part thereof, but not with copies, the following exhibits:

(1) As Exhibit A, one or more of the following documents as may be appropriate:

(i) One copy each of the charter or articles of incorporation, and the bylaws and amendments thereof, of each applicant corporation or carrier corporation involved in the proposed transaction, duly certified by the appropriate public officer.

(ii) A properly authenticated copy of the articles of copartnership, if any, of each copartnership which is a party to the transaction.

(iii) A properly authenticated copy of articles of association, trust agreement, or other documents evidencing organization of each association or other form of organization, except a corporation, which is a party to the transaction.

(iv) A properly authenticated copy of the order of the court or instrument appointing each trustee, receiver, assignee, or personal representative which is a party to the transaction.

(2) As Exhibit B, a properly authenticated copy of the annual report, if any, to stockholders or shareholders for each of the two calendar or fiscal years preceding the filing of the application.

(b) There shall be filed with the original application, and with each copy, as a part thereof, the following exhibits:

(1) As Exhibit 1, a copy of all resolutions of directors of each applicant and of each carrier which is a party to the transaction, authenticated by a proper executive officer, authorizing the proposed transaction and, where applicable, the making of the application to the Commission for its approval and authorization; and, if the charter or bylaws of the applicant or carrier require approval of the stockholders, a copy of the resolutions of stockholders authorizing the proposed transaction and the making of the application; all such resolutions to be accompanied by sufficient transcripts of the minutes of meetings of the stockholders or directors of the applicant or carrier to show the number of shares entitled to vote, the number of shares voted for and against the resolutions, and the number of share-votes required to adopt the resolution.

(2) As Exhibit 2, a copy of all resolutions of stockholders or directors of the applicant, or duly authorized committee thereof, authenticated by a proper executive officer of the applicant, designating by name and for that purpose the executive officer by whom the application is signed and verified, and filed on behalf of the applicant.

(3) As Exhibit 3, if an organization other than a corporation is an applicant, documentary evidence show-

ing authorization and designation of the individual or individuals, signing, verifying, and filing on behalf of the applicant.

(4) As Exhibit 4, if a trustee, receiver, assignee, or personal representative of the real party in interest is an applicant, a certified copy of the order, if any, of the court having jurisdiction, authorizing the contemplated action.

(5) As Exhibit 5, opinion of counsel of applicant or of the applicants and carriers, that the transaction described in the application meets the requirements of the law and will be legally authorized and valid, if approved by the Commission with specific reference to any specially pertinent provisions of applicant's, or applicant's and carrier's charter or articles of incorporation.

[Remainder of regulation does not relate to charter provisions.]

APPENDIX B

The Opinion of the Court of Appeals

* * *

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 17,836

Mississippi River Fuel Corporation, William G. Marbury, Glenn W. Clark, D. B. Jenks, Sam B. Cook, James Lee Johnson, C. D. Peet, John C. Bolinger, Jr., James M. Kemper, Jr., and Missouri Pacific Railroad Company, *Appellants*,

v.

Rose Slayton, Joseph M. Proskauer, Walter Mendelson, Alfred L. Rose and Dorothy B. Rose: Alleghany Corporation, and Empire Trust Company, a Corporation, as Voting Trustee: and Betty Levin, *Appellees.*

Appeal from the United States District Court for the Eastern District of Missouri.

[April 19, 1966.]

Before VAN OOSTERHOUT, BLACKMUN, and MEHAFFY, Circuit Judges.

BLACKMUN, Circuit Judge.

This litigation is a chapter in the struggle between the holders of the respective majorities of the two classes of

outstanding shares of the Missouri Pacific Railroad Company (MoPac).

The district court has denied defense motions to dismiss complaints in three separate diversity actions instituted by certain Class B shareholders of MoPac. The court's ruling was one restricted to the declaratory issue of the necessity of voting by classes on a proposed plan of consolidation of railroads. Decision on all other questions was reserved. *Slayton* v. *Missouri Pac. R.R.*, 233 F.Supp. 747 (E.D. Mo. 1964). The trial court has certified the matter under 28 U.S.C. § 1292(b) and this court has permitted the appeals from the interlocutory order. Further proceedings have been stayed.

MoPac, a Missouri corporation and an interstate common carrier by railroad, emerged as of January 1, 1955, from reorganization proceedings which had been pending under § 77 of the Bankruptcy Act, 11 U.S.C. § 205, for more than 22 years. See *Missouri Pac. R.R. Reorganization*, 290 I.C.C. 477 (1954); *In re Missouri Pac. R.R.*, 129 F.Supp. 392 (E.D. Mo. 1955), aff'd sub nom. *Missouri Pac. R.R. 5¼% S.S.B.C.* v. *Thompson*, 225 F.2d 761 (8 Cir. 1955), cert. denied 350 U.S. 959; *In re Missouri Pac. R.R.*, 135 F.Supp. 102 (E.D. Mo. 1955), aff'd sub nom. *Missouri Pac. R.R. 5¼% S.S.B.C.* v. *Thompson*, 229 F.2d 898 (8 Cir. 1956). It so emerged without preferred stock but with two classes of $100 stated capital no par voting common: Class A, which is preferentially entitled to noncumulative dividends of not to exceed $5 per share per year, and, upon liquidation or dissolution, to $100 per share plus declared but unpaid dividends; and Class B, as to which earnings and equity in excess of the Class A preferences are available. The Class A shares replaced

Appendix B

MoPac's old preferred and accumulated dividends thereon and the Class B shares replaced MoPac's old common.

Among the well-pleaded facts alleged in one or more of the three complaints and therefore, for purposes of these motions to dismiss, to be accepted as true, *Cooper* v. *Pate*, 378 U. S. 546 (1964); *Bonnot* v. *Congress of Independent Unions*, 331 F. 2d 355, 357 (8 Cir. 1964), are the following:

a. MoPac has outstanding 1,849,576 shares of Class A stock and 39,731 shares of Class B stock.

b. The Texas and Pacific Railway Company (T&P) was incorporated by Act of Congress in 1871 and is an interstate common carrier by railroad. It has outstanding 445,464 shares of one class of stock. MoPac owns 369,111, or 82.86%, of these shares.

c. Mississippi River Fuel Corporation (Mississippi) is a Delaware corporation. It began acquiring MoPac Class A stock in 1959. It now owns in excess of 1,071,895, or 57.95%, of the Class A shares.

d. Alleghany Corporation (Alleghany) is a Maryland corporation. Since 1958 it has owned beneficially in excess of 20,500, or 51%, of the Class B shares of MoPac. This holding is subject to a voting trust agreement between Alleghany and Empire Trust Company, a New York corporation, as voting trustee.

e. The individual plaintiffs, totaling six in the three suits, own the following amounts of MoPac's Class B shares: Rose Slayton, not stated (but presumably 10 shares); Joseph M. Proskauer, 100; Walter Mendelson,

50; Alfred L. Rose, 50; Dorothy B. Rose, 50; Betty Levin, 85.

f. Most of the named individual defendants are the present directors of MoPac. Some of them are also directors and officers of Mississippi and of T&P. Neither Mississippi nor any of the individual defendants, with one exception, owns any of MoPac's Class B shares.

g. Texas & Missouri Pacific Railroad Company (T&M) is a newly organized Delaware corporation. Its equity capital consists solely of $25 par common stock.

h. MoPac's Articles of Association provide, Article VII, Section D(4), that, except for restrictions specified in Section D(3), or as otherwise required by law, each share of Class A and each share of Class B "shall have the same voting power" and that the vote of the holders of any class of stock, as a class "shall not be required for any other action whatsoever . . . including any amendment to the Articles of Association". Section D(3), however, states that four kinds of corporate change shall not be effected without the consent of the record holders of a majority of the Class A shares and of a majority of the Class B shares. These are: (a) the issuance of additional shares; (b) the creation or issuance of any MoPac obligation or security convertible into or exchangeable for MoPac shares; (c) an alteration or change in "the preferences, qualifications, limitations, restrictions and special or relative rights of the Class A Stock or of the Class B Stock"; and (d) the amendment or elimination of any of the provisions of Section D(3). The exact language of

these portions of the MoPac Articles is set forth in the margin.[1]

i. In December 1963 the boards of directors of MoPac and T&P approved an "Agreement and Plan of Consolidation" which would effect the consolidation of MoPac and T&P into T&M as the surviving corporation. The plan provides that each share of MoPac, both Class A and Class B, shall be exchanged for four shares of T&M and that each share of T&P (other than those owned by MoPac) shall be exchanged for 4.8 shares of T&M.

j. MoPac's board announced that its Class B shareholders are not entitled to vote on the plan separately and apart from its Class A shareholders and that it in-

1. Article VII, Section D.

"(3) The Company shall not, without the consent, given in writing or by resolution adopted at a meeting duly called for that purpose, of the holders of record of at least a majority of the number of shares of the Class A Stock then outstanding and at least a majority of the number of shares of the Class B Stock then outstanding, (a) issue any shares of stock of the Company of any class now or hereafter authorized in addition to the shares authorized to be issued by the provisions of Section C of this Article VII, (b) create or issue any obligation or security of the Company convertible into or exchangeable for shares of stock of the Company of any class, (c) alter or change the preferences, qualifications, limitations, restrictions and special or relative rights of the Class A Stock or of the Class B Stock or (d) amend or eliminate any of the provisions of this paragraph (3).

"(4) Except as otherwise provided above in paragraph (3) of this Article VII, or as otherwise required by law, each share of Class A Stock and each share of Class B Stock shall have the same voting power, and the vote of the holders of all or any portion of any class of stock, as a class, shall not be required for any other action whatsoever to be taken or authorized by the stockholders of the Company, including any amendment to the Articles of Association. . . ."

tended to submit the plan only to the collective vote of Class A and Class B.

k. In January 1964 MoPac, T&P and T&M filed their joint application with the Interstate Commerce Commission for an order, under § 5(2) of the Interstate Commerce Act, 49 U.S.C. § 5(2), authorizing the proposed consolidation and, under § 20a, 49 U.S.C. § 20a, authorizing the issuance of securities by T&M. In this application MoPac stated that it intended to submit the proposed plan to its shareholders for approval, as contemplated by § 5(11) of the Act, 49 U.S.C. § 5(11), by May 1964 by the shareholders' collective vote.

We note parenthetically at this point that, while Mississippi owns the majority of MoPac's outstanding Class A shares and Alleghany beneficially owns the majority of MoPac's outstanding Class B shares, Mississippi obviously owns the majority of the total of Class A and Class B. We note further that, under the plan, the proposed one for four exchange of both Class A and Class B for T&M shares would result in the present Class B holdings being engulfed by the larger number of Class A holdings.

In 1963, after the boards' approvals of the plan but prior to its submission to the ICC, Class B shareholder Slayton instituted the first of the three suits with which this appeal is concerned. The four plaintiffs Proskauer, Mendelson, and Rose have been permitted to intervene in that suit. The action is one against MoPac, Mississippi, and twelve individual defendants. The complaint as amended alleges, among other things, that the plaintiffs bring the action on behalf of themselves, represent-

atively on behalf of all other (approximately 1200) Class B shareholders of MoPac, and derivatively on behalf of MoPac itself; that since about 1960 Mississippi "did and it now does control MoPac, select and dominate its directors and principal executives and determines its policies and the conduct of its affairs"; that Mississippi acquired this control illegally; that the plan "is grossly unfair and inequitable" to the Class B shareholders; that the value of one Class B share is many times greater than the value of one Class A share; that the plan is "a fraudulent and manipulative device adopted by defendants to enhance the value of the Class A shares at the expense and to the detriment of the holders of the Class B shares"; that the proposed consolidation "serves no valid or legitimate business purpose" of MoPac; that the adoption of the plan by MoPac's board "results from the illegal exercise by Mississippi of its control over" MoPac; that the approval and consummation of the plan would cause irreparable injury to the Class B shareholders; and that the call of a MoPac shareholders' meeting to vote on the plan would cause irreparable loss and expense to MoPac. The prayer asks for damages and an injunction and also for a declaration that the Class B shareholders are entitled to vote on the plan separately and apart from the Class A shareholders.

The second action was instituted by Alleghany and Empire in February 1964. It names MoPac, Mississippi, and 12 individuals as defendants. The third action was instituted in the same month by plaintiff Levin on behalf of herself and all other Class B shareholders and derivatively on behalf of MoPac. It names as defendants Mississippi, MoPac, T&P, and 16 individuals. Generally,

the allegation and prayers for relief in the complaints in these two suits are similar to those in the Slayton complaint. One or both of them, however, contains allegations to the effect that the pursuit of the plan before the ICC will irreparably damage the Class B shareholders and effect a waste of the corporate assets of MoPac; that the class voting issue is one which lies within the jurisdiction of the district court and "not within either the purview or jurisdiction of the Interstate Commerce Commission"; and that the defendants are engaged in a course of conduct calculated to enrich themselves at the expense of the Class B shareholders. Each complaint raises the question whether approval of the plan is subject to class vote by MoPac and each requests, in addition to other relief, a declaration that the plan requires the approval of the holders of the majority of the outstanding Class B shares.

Motions to dismiss the respective complaints were filed. Submission of the plan to the MoPac shareholders was then deferred. The several motions assert, among other things, that (a) the district court is without jurisdiction to pass upon the merits of the plan or the lawfulness of submitting it to MoPac shareholders and to the ICC because sole jurisdiction as to this is exclusively in the ICC and the plaintiffs therefore have an adequate remedy under § 5 of the Interstate Commerce Act, and (b) the complaints on their face show that the holders of Class B shares are not entitled to vote separately on the plan.

The parties agreed to a limited consolidation of the cases for the hearing of motions. They also agreed that the court should first pass on the voting rights question. It was recognized that if the court decided that a favor-

able separate vote of the Class B shareholders was necessary for the approval of the plan, then, in view of Alleghany's stated specific opposition, other questions might not require decision. Accordingly, the district court directed its attention to this initial and particular issue.

The court held, pp. 749-52 of 233 F.Supp., that said Section D(3) of MoPac's Articles did prohibit "In plain language, . . . unless class voting is observed, company action" which alters or changes the relative rights of the two classes of stock; that the agreement to consolidate constitutes company action by MoPac; that under Missouri Law, namely, V.A.M.S. § 351.270, the voting requirements are controlled by MoPac's Articles; that, in addition, under § 5(11) of the Interstate Commerce Act, a carrier's authority to consolidate is conditioned; that the proposed consolidation here "seems so plainly and obviously to alter and change the preferences, qualifications, limitations, restrictions and special and relative rights of the Class A and the Class B shares as not to require discussion"; that the plan not only would change the present relative participation in equity but also would destroy the Class B shareholders' constantly accruing percentage increase of the total equity and fix their equity participation permanently at 2%; that the plan will result in the elimination of MoPac and the obliteration of Section D (3); and that it thus requires for approval a majority of the Class A shares and a majority of the Class B shares. In this posture the case comes to us.

We reverse.

We are concerned here with a proposed plan for consolidation of two interstate common carriers by railroad, MoPac and T&P, with the new T&M as the surviving cor-

poration. This contemplated move is obviously subject to the provisions of the Interstate Commerce Act and particularly to § 5 thereof.

It seems evident, then, that our approach to the case must begin with the National Transportation Policy[2] enunciated by Congress as part of the Transportation Act of 1940, 54 Stat. 898, 899, 49 U.S.C. preceding § 1.

The Supreme Court has stated that the policy "specifies in its terms that it is to govern the [Interstate Commerce] Commission in the administration and enforcement of all provisions of the Act, and this Court has made it clear that this policy is the yardstick by which the correctness of the Commission's actions will be measured". *Schaffer Transp. Co.* v. *United States*, 355 U.S. 83, 87-88 (1957). The policy is therefore to be borne in mind, specifically, in connection with the federal statutes governing railroad consolidation. Those statutes, furthermore, have a significant and well-known history of their own which merits brief mention here.

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2. "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act . . . to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof . . . all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act . . . shall be administered and enforced with a view to carrying out the above declaration of policy."

Appendix B

At the conclusion of World War I, when the government was planning to return the country's railroads to private ownership, many smaller roads were financially weak and their survival was questionable. This prompted the Transportation Act of 1920, 41 Stat. 456, 481, by which Congress directed the ICC to take the initiative in developing a plan for the consolidation of American railroads "into a limited number of systems". There was, however, serious disagreement as to whether the Commission should be given the power to compel consolidation. In the end, the legislation provided that, although the Commission could promulgate a plan, it possessed no power to implement the plan. This, perhaps understandably, proved inadequate. The 1940 Act then relieved the Commission of its duty to provide a national consolidation plan. Initiation of mergers and consolidations remained, as before, in the hands of the carriers. "Thus, hostility to the consolidation of railroads except by the voluntary action of the merging roads has been the undeviating policy of Congress since 1920". *St. Joe Paper Co.* v. *Atlantic C.L.R.R.*, 347 U.S. 298, 305, and appendix, pp. 315-21 (1954); *County of Marin* v. *United States*, 356 U.S. 412, 417 (1958); *Schwabacher* v. *United States*, 334 U.S. 182, 191-193 (1948).

Marin tells us that the purpose of the 1940 Act's "sweeping revision of § 5 . . . was to facilitate merger and consolidation in the national transportation system", p. 416 of 356 U.S. And *Schwabacher* informs us that the tenor of prior Supreme Court decisions "was to confirm the power and duty of the Interstate Commerce Commission, regardless of state law, to control rate and capital structures, physical make-up and relations between

carriers, in the light of the public interest"; that the 1940 Act authorized approval by the Commission of voluntary consolidation of the kind contemplated by §5(2)(a) if it will be consistent with the public interest, if, subject to any modification made by the Commission, it is just and reasonable, and if there be assent of a "majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote", §5 (2)(b) and (11); that "When these conditions have been complied with, the Commission-approved transaction goes into effect without need for invoking any approval under state authority"; that the Commission was given complete control of the capital structure to result from a merger; that the "jurisdiction of the Commission under both §5 and §20a is made plenary and exclusive and independent of all other state or federal authority"; that "the Commission must look for standards in passing on a voluntary merger only to the Interstate Commerce Act"; and that rights of dissenting stockholders "are, as a matter of federal law, accorded recognition in the obligation of the Commission not to approve any plan which is not just and reasonable". Pp. 192, 194, 195, 197, 198, and 201 of 334 U.S.

We necessarily assume that these pronouncements of the Supreme Court mean exactly what they say. We regard as significant the Court's emphasis on (a) the lodging of responsibility over railroad mergers in the Commission and not elsewhere; (b) the voluntary initiation

by the carriers themselves of proposals for consolidation; and (c) the basic supremacy of federal law.[3]

We must recognize, too, that the merits or demerits and the fairness or unfairness of a proposed railroad consolidation are not, in the first instance, matters for our jurisdiction or our concern, or for the jurisdiction or concern of the district court. These are for the expertise of the Interstate Commerce Commission. The Act, both in §5(11) and in §20a(7), is specific. Commission action in this area is then subject to review by a three-judge district court, 28 U.S.C. §§2321-25, with direct appeal to the Supreme Court, 28 U.S.C. §1253.

There should be no argument as to this. The plaintiffs here do not really contend otherwise. Yet they devote substantial portions of their several briefs in expounding and protesting the proposed plan and its adverse and assertedly inequitable effects upon the Class B shareholders. We can sympathize, and we appreciate why the plaintiffs indulge in this approach. One observes readily what the proposed plan appears to do to the Class B holdings. See pp. 751-52 of 233 F.Supp. But we lay these aspects generally to one side because they bear primarily upon the plan's merit and thus constitute grist for the Commission and not, at this time, for the courts.

We conclude that the proposed consolidation and the plan for effectuating it are the very things which congressional policy has earmarked and preempted for the

3. It is of interest to note that Mr. Justice Frankfurter, in speaking for the dissenters in *Schwabacher*, said, p. 205 of 334 U. S.:

> "The Court now holds that State law governing the relations between State-chartered carriers and their stockholders is impliedly supplanted as to those who have refused to assent to a merger. . . ."

Commission, that jurisdiction over them normally and presumptively rests with that agency, and that anything contrarily indicated by state law or by state charter must give way except when clearly recognized by the Interstate Commerce Act itself. We therefore are relegated to consider here only whether there is anything in the Act, which, directly or by deference to MoPac's Articles or to Missouri law, prevents or affects the Commission's exercise of this jurisdiction.

1. The Interstate Commerce Act. Section 5(2)(a) provides that it shall be lawful, with the approval and authorization of the ICC, for two or more carriers to consolidate or merge. The section then goes on to outline the administrative procedures to be followed in achieving this end. Section 5(11)[4] grants the carrier full power,

4. §5(11): "The authority conferred by this section shall be exclusive and plenary and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power (with the assent, in the case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, of a majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation at a regular meeting of such stockholders, the notice of such meeting to include such purpose, or at a special meeting thereof called for such purpose) to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority; and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and

when the transaction is approved by the Commission, but with an important parenthetical restriction, "to carry such transaction into effect . . . without invoking any approval under State authority"; relieves the carriers from the operation of the antitrust laws "and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal" as may be necessary to enable them to carry into effect the Commission-approved transaction; and recites that any power given any carrier by the section "shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State".

This is broad and incisive language. We find nothing in the Act with respect to shareholder voting other than the parenthetical material in §5(11). That material is the sole instance where the statute bows in the direction of state law.

What, then, does the statute's parenthetical language mean? And does it have application here? One immediately observes five phrases: (a) "a corporate consolidation", (b) "the assent . . . of a majority", (c) "unless a different vote", (d) is "required under applicable State law", and (e) "in which case the number so required shall assent".

No one disputes that what is sought here is a factual consolidation of MoPac and T&P. The proposed transac-

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to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. Nothing in this section shall be construed to create or provide for the creation, directly or indirectly, of a Federal corporation, but any power granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State."

tion would seem to qualify, then, as something to which §5(2) and (11) and Commission jurisdiction and the parenthetical phrase all have application. Plaintiff Levin argues, however, that whether a transaction is a consolidation at all within the meaning of §5(2) depends, wholly apart from its trappings, upon "essential character" or "primary objective". She cites *Marin*, supra, and *Wood v. United States*, 132 F.Supp. 586 (S.D.N.Y. 1955), in support of this approach. In those cases the courts held transactions not to be within Commission jurisdiction. They did so, however, because of the form of the transaction itself and not because of intent or motive of the parties. *Marin*, for example, concerned a corporate division or split-up, not a consolidation; at pp. 418-19 of 356 U.S. the Supreme Court expressly stated that the question of justification for the proposed transaction was not before it. We therefore are not persuaded by the Levin argument that motive of itself is a determinative factor in a transaction's qualification as a "corporate consolidation" within the language of §5(11). See *Cleveland, C.C. & St. L. Ry* v. *Jackson*, 22 F.2d 509 (6 Cir. 1927).

Accepting the conclusion that the parenthetical material is applicable here, it is evident that the primary standard of application is a vote of the majority of all the voting shares. The statute speaks, in the first instance, "of a majority . . . of the votes of the holders of the shares entitled to vote". Departure from this standard is, then, the exception and not the rule.

This takes us to the vital and determinative phrase, "required under applicable State law". State law in this case is Missouri's. A review of that law requires, first, a more detailed examination of MoPac's Articles.

Appendix B

2. MoPac's Articles. What, precisely, does Section D (3) and (4) mean and to what extent, if any, is it controlling here? The pertinent provisions of D(3) and (4) are quoted in footnote 1, supra. In requiring a vote by classes on the four specific matters the Articles state that "The Company shall not . . .". MoPac and Mississippi assert that this provision regulates only "internal" or "intracorporate" action and has no application to a consolidation. Thus, it is said, any alteration of dividend or liquidation rights of MoPac's shares or of the provisions of D(3), upon the adoption of the proposed plan, would result from the consolidation and not from action by "The Company".

There is other argument in support of a restrictive interpretation of D(3), namely, (a) that nowhere in D(3) is there any reference to merger or consolidation, that is, to external action; (b) that, nevertheless, merger and consolidation obviously were not overlooked by the draftsman of the Articles for these are contemplated by the National Transportation Policy, are frequent among railroads, were considered in the MoPac reorganization proceedings and, in fact, are mentioned in D(2); (c) that nowhere in the Articles are there protective provisions for any class of stock in the event of a merger or consolidation; (d) that D(4) establishes the denial of class voting as the rule and not as the exception; (e) that special preference is to be created only by clear and unambiguous language; (f) that this standard should not be weakened by implication, particularly when a consolidation, before it can be effectuated, must be found by the Commission to be just and reasonable and consistent with the public interest; (g) that the history of the MoPac reorganization

discloses an initial conviction on the part of the Commission and the courts, continuing through the third plan, that the old common was valueless, see *Texas v. Group of Institutional Investors,* 191 F.2d 265, 273-74 (8 Cir. 1951), cert. denied 342 U.S. 904, 918 and 343 U.S. 929, and that, with respect to the subsequently approved Agreed System Plan, the Commission refused to give the Class B stock even as much as 4% of the voting power and limited it to 2%; and (h) that it is inconceivable that it was intended to give a veto power over a consolidation to MoPac's old common shareholders, who had, at the most, only a "possible future equity", or, to put it another way, to give the veto to a bare majority, or perhaps even less, of 2% of the outstanding shares (in this case Alleghany alone), irrespective of how well the consolidation might serve the interests of the railroad, its creditors, and the public.

There is contrary argument. This is to the effect (a) that the proposed plan will indeed accomplish a change in "the preferences, qualifications, limitations, restrictions and special or relative rights" of the Class A and Class B shares, within the meaning of D(3); (b) that MoPac will necessarily be a participant for, although T&P and T&M also must act, the plan will not come about without the approval of MoPac's board and shareholders; (c) that, thus, there is company action; (d) that it is the end result, not the means, which is significant; (e) that the purported distinction between "internal" and "external" has no basis in the Articles and is arbitrary; (f) that were a consolidation to be excluded from the prohibitory language of D(3) it would have been expressly stated, just as it was in D(2); (g) that MoPac's old common shareholders received recognition in the reorganization,

as finally consummated, not as a matter of grace but as a matter of right; (h) that any veto power they now possess came to them because it was fair and reasonable and because it was a recognition of rights normally accorded to equity owners; and (i) that the economic effect of the proposed plan is precisely the same as if there were an acquisition by MoPac of the properties of T&P and an issuance of MoPac stock to the minority shareholders of T&P, a procedure which, if directly pursued, would require Class B approval under D(3)(a).

These opposing points of view as to MoPac's Articles are not easily resolved. But MoPac's Articles do not stand alone. Hovering over them, as we have indicated, is §5(11). Accordingly, we move on to the Missouri law and the Articles' posture within that law.

3. The Missouri law. We encounter at once the problem of determining what is "applicable State law" here. There are several possibilities:

a. V.A.M.S. ch. 388 is entitled "Railroad Corporations". Section 388.010 says the term "railroad corporation" means "all corporations . . . now owning or operating or which may hereafter own or operate, any railroad in this state". This definition would include MoPac. Section 388.290, paragraph 1, authorizes the consolidation of two or more railroad companies "in this state" owning railroads "constructed wholly or in part, which, when completed and connected, will form in the whole or in the main one continuous line of railroad". It provides for approval "by a majority in interest of all the stock held in each company". Paragraph 3 reiterates the denial of consolidation authority except when "a continuous line of

roads is secured, running in the whole or in the main in the same general direction", and prohibits consolidation where "it will deprive the public of the benefit of competition between said roads". Section 388.300 authorizes a railroad company to "aid" another under specified circumstances and refers to assent thereto by "a majority of the stock of such company".

There immediately arise a number of questions as to the applicability of these chapter 388 statutes, or any of them, to the proposed plan. Some of these impress us as of no real substance. One such is the objection that T&M, being already an existing corporation, makes the plan a merger, rather than a consolidation. Another, suggested by Slayton, is that T&M is not a railroad company because it does not now operate a railroad or own one already constructed. We prefer to regard T&M as a tool organized to effect a genuine consolidation and not as something which, merely because of its present existence, renders the statute inapplicable.

More troublesome is the phrase, "in this state", which MoPac concededly describes as "somewhat obscure". This must refer to something, either the state of incorporation or the location of assets, or business activity. But T&P is not a Missouri corporation and has no railroad properties in Missouri. Further, the requirement of § 388.290 that the consolidated line be a continuous one running in the same direction does not find support in the pleadings here. In addition, the predecessors of chapter 388, viz., Laws of 1869, p. 75, and Laws of 1870, p. 89, were statutes of obviously limited purpose. Finally, we entertain difficulty in discerning any applicability here of § 388.300.

MoPac and Mississippi of course contend that chapter 388 and its majority vote provisions are applicable. While

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MoPac concedes that the history of railroad consolidation law in Missouri "is confused", it stresses that no Missouri railroad consolidation statute has ever required a class vote, although such a vote is required when a railroad corporation seeks to alter its capital structure by amendment of its articles. § 388.220, par. 2(3)(c). It also points out that Missouri railroad corporations have consolidated with foreign railroad corporations under chapter 388. *State ex rel. Wabash Ry. v. Roach*, 267 Mo. 300, 184 S.W. 969 (1916), is cited as one example "in which the Missouri Supreme Court took for granted the propriety of the consolidation under Chapter 388". Our reading of that case, however, see p. 972 of 184 S.W., suggests to us that the consolidation was one made pursuant to the special provisions of § 388.300.

MoPac also points out that "the last great consolidation involving a Missouri railroad", namely, that of the Missouri-Kansas-Texas, was effected through a plan precisely the same in structure as the one here proposed, and that it must have been accomplished under chapter 388 because the two-thirds vote otherwise required by chapter 251, hereinafter mentioned, was not present. *Missouri-Kansas-Texas R.R. Consolidation*, 312 I.C.C. 15 (1960). This may well have been the case but the material concerning that consolidation which has been submitted to us does not reveal that it was effected in the face of opposing argument. We do not find the M-K-T example any more persuasive than the contrary suggestion by plaintiff Levin that during the MoPac reorganization the ICC and the district court appear to have assumed that it was chapter 351 which applied to a merger of MoPac and a Louisiana subsidiary. P. 684 of 290 I.C.C. and p. 402 of 129 F.Supp.

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We conclude that, despite chapter 388's broad titular application to railroad corporations, it is in fact confined to special situations of a kind different from the proposed plan here. It is, therefore, not "applicable State law", within the scope of §5(11), so that its majority vote standard would control.

b. V.A.M.S. ch. 351, is entitled "General and Business Corporations". Section 351.690(3) provides that "Only those provisions of this law which supplement the existing laws applicable to railroad corporations . . . and which are not inconsistent with, or in conflict with the purposes of, or are not in derogation or limitation of, such existing laws, shall be applicable to" railroad corporations. If we are correct in our above analysis that chapter 388 is addressed to fact situations different from that of the proposed plan, and if we may assume, as we think we can, that the proposed plan is not one specifically prohibited by chapter 388, see, for example, §388.290(3), then §351.690(3) would seem to indicate that chapter 351 does have application here.

Section 351.458 authorizes merger and consolidation with a foreign corporation. Section 351.420 provides that a plan of consolidation shall be submitted to a vote of the shareholders. Section 351.425 provides that the plan "shall be approved upon receiving the affirmative vote of the holders of at least two-thirds of the outstanding shares entitled to vote at such meeting, of each of such corporations".[5] We note in these cited sections of chapter 351

5. The district court, when approving the fourth MoPac reorganization plan, held that this shareholder approval was not required *before* submission of the plan to the ICC. *In re Missouri Pac. R.R.*, supra, p. 402 of 129 F.Supp.

the absence of any reference to class voting and thus are tempted to conclude that, were these sections alone to be considered, class voting would not be required for a consolidation and that the only necessary vote would be that of two-thirds of all the outstanding voting shares. *Moss Estate, Inc.* v. *Metal & Thermit Corp.*, 73 N.J. Super. 56, 179 A.2d 54, 62 (Ch. 1962).

But chapter 351 also contains §351.270, with its provocative provisions.[6] The ultimate issue, then, is whether this section operates to make any class voting provisions of MoPac's Articles applicable to a consolidation plan when the Missouri consolidation statute itself does not impose that requirement. The district court decided this issue in the affirmative, with an unembellished reference to §351.270, p. 750 of 233 F.Supp.

Mississippi argues that because MoPac's Articles do not provide for class voting on any consolidation, the section cannot apply. It and MoPac also argue that §351.270's words, "required by this chapter", are important; that they contemplate only the possibility of greater preponderance in voting; that, for example, they permit a requirement of more than the two-thirds vote otherwise specified by § 351.425; that, however, they cannot serve to engraft class voting on a situation where it does not otherwise exist; that, if they did permit this, the Articles would supersede the consolidation statute; that, as a principle, the applicable Missouri statutes are writ-

6. §351.270. "Whenever with respect to any action to be taken by the stockholders of a corporation the articles of incorporation require the vote or concurrence of the holders of a greater portion of the shares, or of any class or series thereof, than required by this chapter with respect to such action, the provisions of the articles of incorporation shall control this section."

ten into every Missouri corporate charter, including Mo-Pac's, citing *Shapiro* v. *Tropicana Lanes, Inc.*, 371 S.W. 2d 237, 241 (Mo. Sup. 1963); *Federal United Corp.* v. *Havender*, 24 Del. Ch. 318, 11 A.2d 331, 338 (Sup. Ct. 1940), and other cases; and that, with respect to similar statutes in other states, no one has suggested the engraftment of class voting upon legislation which merely authorizes articles to provide for greater percentages.

The plaintiffs, singly or together, argue that § 351.425's silence on class voting is not negation; that § 351.055(3) authorizes classes of shares; that, therefore, class voting as well as percentages may be superimposed upon the voting percentage required by § 351.425; that the appellants' arguments would render meaningless the reference in § 351.270 to a "series" of shares because chapter 351 nowhere else speaks of a series; that a commentator upon the parallel Illinois statute has reached a conclusion opposite to that espoused by the appellants, Haller, Corporate Control Under the Illinois Business Corporation Act Through Charter and By-Law Provisions, 32 Chi. Bar Rec. 411, 413 (1951); and that it would be bizarre, indeed, to say that § 352.270 permits articles to call for a very high percentage, even all, of the voting shares but at the same time denies class voting.

Here, again, we perceive no clearcut, free-from-doubt and positive answer in these chapter 351 sections to the issue of class voting under Missouri law. We do conclude that the proposed plan is one governed by chapter 351. But we are not prompted to conclude, with any assurance, that the general two-thirds-of-voting-shares standard embraced by § 351.425 is qualified by § 351.270 to the extent that it demands class voting if the articles seem to require it.

c. If, however, it be assumed that § 351.425 and § 351.270 do defer to MoPac's Articles so far as a consolidation is concerned, and if it be further granted that MoPac's Articles call for a class vote on consolidation, two additional questions arise: Are the Articles then "State law", within the meaning of § 5(11)? If so, is class voting then "required" or merely permitted under that state law?

MoPac argues that whatever may be the legal status of the Articles as between MoPac and the State of Missouri, or as among its shareholders, the Articles are not organic law of the state; that the Supreme Court of Missouri has typified a business corporation as a product of private contract and the articles as a contract between the shareholders, *Shapiro* v. *Tropicana Lanes, Inc.*, supra, p. 241 of 371 S.W.2d; that this certainly is not "applicable State law"; and, lastly, that there is an overriding public interest in the MoPac situation. Mississippi buttresses this by arguing that "State law" means statutory law and not common law or the law of contracts. There is authority which supports this approach. *Gilliam* v. *California Employment Stabilization Comm'n*, 130 Cal. App.2d 102, 278 P.2d 528, 536 (1955); *Brinckerhoff* v. *Bostwick*, 99 N.Y. 185, 1 N.E. 663, 665 (1885); *Board of Educ.* v. *Town of Greenburgh*, 277 N.Y. 193, 13 N.E.2d 768, 770 (1933); *Delta County* v. *City of Gladstone*, 305 Mich. 50, 8 N.W.2d 908, 909 (1943); *State ex rel. McKittrick* v. *Missouri Pub. Serv. Comm'n*, 352 Mo. 29, 175 S.W. 2d 857, 861 (1943); see *Travelers Health Ass'n* v. *FTC*, 298 F.2d 820, 822 (8 Cir. 1962).

The appellees' response is simply that § 351.270 authorizes charter provisions to impose class voting, that the MoPac charter provides for it, and that a class vote is

therefore required under applicable state law. This reasoning may find some support in *Sellers* v. *Joseph Bancroft & Sons,* 23 Del. Ch. 13, 2 A.2d 108 (Ch. 1938).

Even without placing reliance on *Sellers,* we might favor not restricting § 5(11)'s reference to "applicable State law" to statutory material. The appellants' cited cases, which announce the general rule that a statutory reference to "law" does not include the common law, recognize that a different result follows when context so requires. *Greenburgh,* supra, p. 770 of 13 N.E.2d; *Gilliam,* supra, pp. 536-37 of 278 P.2d. We think of no persuasive reason for regarding § 5(11) as distinguishing between a statutory provision for a class vote and a charter provision for it pursuant to statutory authority. Also, the statute speaks of a vote *under,* rather than *by,* state law; "under" does not connote quite so strongly the specification of a statute but, rather, rights and duties measured by law generally. And there is some indication in the ICC regulations for adherence to charter provisions in consolidation proceedings. 49 C.F.R. 352.3 (1940).

Be that as it may, we are driven to the word "required" in § 5(11). "Required" implies something mandatory, not something permitted by agreement. The difference in concept has been judicially recognized. *In re Boyd,* 213 Fed. 774, 775-76 (2 Cir. 1914); *Huey* v. *Waldrop,* 141 Ala. 318, 37 So. 380 (1904).

We conclude that the MoPac Articles and the Missouri railroad and business corporation statutes do not provide material which carries us far enough. In summary, and in repetition: We hold that the proposed plan is one for a "corporate consolidation" and that the parenthetical mate-

rial of § 5(11) is applicable. We conclude that a majority of all voting shares in the aggregate is the general standard and that the statute bows in the direction of state law only with its phrase beginning with "unless". We also conclude that chapter 351 has application to the proposed plan. But, while there are significant contrary arguments, we are not persuaded either (a) that MoPac's Articles call for a class vote on a consolidation, or (b) that, if they do, § 351.270, by its reference to the articles, demands a class vote, or (c) that, even if it does, class voting is something "required under applicable State law". In our view, the Class B shareholders must surmount each and all of these hurdles in order to prevail. We are not convinced that they have surmounted any of them. We are impressed with the significance of the national transportation policy and its emphasis on railroad consolidation, with the stated exclusive and plenary character of § 5(11), and with its consequent preemptive nature. All this compels us, when we entertain doubt for the contrary result, as we do here, to resolve that doubt on the side of those provisions of the statute which bespeak the rule and not on the side of those which provide the exceptions.

We take comfort in the fact that, if we err in our conclusions, the Class B shareholders still possess that protection, inherent in § 5(2)(b), which is always available to those affected by Commission action on a consolidation plan, namely, that the plan be consistent with the public interest and just and reasonable, and that it is subject to the usual court review. Our present decision, although adverse to the Class B shareholders, does not deprive them of anything which may properly be presented before the Commission and on such review.

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Perhaps we should add a final word about two lines of argument which appear in the respective briefs:

1. Each side asserts that in the past the other has adopted a position not consistent with that now espoused. Collateral estoppel, equitable estoppel, and res judicata are all suggested. We are satisfied that any inconsistency, to the extent it is present at all, is not of such dignity or surrounded with such circumstances as support either estoppel or res judicata. One or more of the accepted essentials for these legal results is absent in each instance.

2. The appellees assert that, in any event, the district court's conclusion was a permissible one upon a doubtful question of state law. The question here, however, is a matter which primarily concerns the interpretation of §5(11). This is a federal statute. Despite its interplay with the Missouri law, our difference with the district court relates to this statute and the national transportation policy. As a consequence, our perhaps too frequent pronouncements about our unwillingness to override a permissible conclusion reached by an experienced trial judge as to a doubtful question of the law of his state, see *Homolla* v. *Gluck*, 248 F.2d 731, 733-34 (8 Cir. 1957), has no persuasive application here.

The order of the district court is reversed and the case remanded.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX C

The Memorandum Opinion of the District Court Below

* * *

United States District Court,

Eastern District of Missouri,

Eastern Division.

Rose Slayton, et al., Plaintiffs, vs. Missouri Pacific Railroad Company, et al., Defendants.	No. 63 C 436 (2).
Alleghany Corporation, et al., Plaintiffs, vs. Missouri Pacific Railroad Company, et al., Defendants.	No. 64 C 48 (2).
Betty Levin, Plaintiffs, vs. Mississippi River Fuel Corporation, et al., Defendants.	No. 64 C 77 (2).

Memorandum.

These three cases, consolidated for the limited purposes of pre-trial discovery and hearings on motions, in major

part arise out of the agreement of the Boards of Directors of defendant Missouri Pacific Railroad Company (hereafter MoPac) and Texas and Pacific Railroad Company (hereafter T&P) to consolidate the two companies into Texas and Missouri Pacific Railroad Company (hereafter T&M), a new Delaware subsidiary of MoPac created for the purpose of the merger, upon approval of the merger by the Interstate Commerce Commission. Subsequent to the filing of the first of these cases, MoPac, T&P and T&M applied to the ICC for an order authorizing consolidation and issuance of securities by T&M. The application to the ICC, under 49 U. S. C. A., §§ 5 (2) and 20 (a), stated, as had been announced earlier by MoPac, that the proposed merger plan would be submitted to their shareholders at an annual meeting on May 12, 1964, for approval by two-thirds of the aggregate of shareholders. Plaintiffs, all holders of Class B shares of MoPac, having filed these actions, defendants thereafter deferred any stockholders' meeting for approval of the proposed plan until the adjudication of the class voting right issue here involved.

Separate motions to dismiss have been filed by the defendant Mississippi River Fuel Corporation, owner of the majority of Class A shares of MoPac, and certain individual defendant members of the Board of Directors of MoPac and by defendant MoPac. The three cases are similar, but not identical, there being some divergence in allegations as well as type of relief sought by plaintiffs on behalf of themselves representatively as Class B stockholders and derivatively for defendant MoPac. Similarly, there is a variety of and various combinations of relief sought—declaratory, injunctive and money damages.

Appendix C

However, common to all three cases is the demand for a declaratory judgment that the proposed consolidation requires the approval of separate majorities of both Class A and Class B stockholders of MoPac. Defendants' separate motions to dismiss are directed to all phases of the several complaints, but we here treat such motions only as they relate to the declaratory issue of class voting rights on the proposed plan of consolidation. On this issue defendants seek dismissal on the ground that the complaints and the exhibits thereunto attached show on their face that plaintiffs are not entitled to so vote and fail to state a claim on which relief can be granted. The matter has been fully briefed by all parties and on April 10, 1964, oral argument was heard by the Court.

For the purpose of the motions, the allegations of fact in the complaints and the inferences reasonably to be drawn therefrom must be taken as true and not in issue. We therefore discuss the factual allegations as though proven and conclude as to the law. The crux of the issue presented is whether or not the plan of consolidation as approved by MoPac must be concurred in by separate majorities of Class A and Class B shareholders of MoPac.

Paragraphs 3 and 4, Article VII, Section D, of the Articles of Association of Missouri Pacific Railroad Company provide:

> "(3) The Company shall not, without the consent, given in writing or by resolution adopted at a meeting duly called for that purpose, of the holders of record of at least a majority of the number of shares of the Class A Stock then outstanding and at least a majority of the number of shares of the Class B Stock then outstanding, (a) issue any shares of stock of the Company of any class now or here-

after authorized in addition to the shares authorized to be issued by the provisions of Section C of this Article VII, (b) create or issue any obligation or security of the Company convertible into or exchangeable for shares of stock of the Company of any class, (c) alter or change the preferences, qualifications, limitations, restrictions and special or relative rights of the Class A Stock or of the Class B Stock or (d) amend or eliminate any of the provisions of this paragraph (3).

"(4) Except as otherwise provided above in paragraph (3) of this Article VII, or as otherwise required by law, each share of Class A Stock and each share of Class B Stock shall have the same voting power, and the vote of the holders of all or any portion of any class of stock, as a class, shall not be required for any other action whatsoever to be taken or authorized by the stockholders of the Company, including any amendment to the Articles of Association. In all elections of directors each stockholder may cast as many votes in the aggregate as shall equal the number of voting shares which he is entitled to vote multiplied by the number of directors to be elected at the election, and each stockholder may cast the whole number of votes, either in person or by proxy for one candidate, or distribute them among two or more candidates, and the directors shall be those persons, in a number equal to the vacancies to be filled, who shall receive the greatest number of votes."

Defendants urge first that since neither "merger" nor "consolidation" is in terms employed in paragraph 3 of Section D of Article VII, the plan for consolidation necessarily falls within paragraph 4 of Section D of Article VII as "any other action" not requiring class voting.

We have considered but found this contention to be without merit since what is proscribed by paragraph 3(c), Section D of Article VII, is "company action" without the consent of the majority of each class of shareholders, altering or changing the preferences, qualifications, limitations, restrictions and special or relative rights of the Class A stock or of the Class B stock without regard to the purpose of such company action, whether it be merger, consolidation or otherwise. The article does not attempt to set out specific types or methods of company action which might be employed to alter or change the relative rights. In plain language, it prohibits, unless class voting is observed, company action, without limitation and without specification as to type or method when such action "alter(s) or change(s) the preferences, qualifications, limitations, restrictions and special or relative rights of the Class A Stock or of the Class B Stock . . ."

Defendants next urge that since MoPac is not to be the surviving corporation and the proposed consolidation will, if consummated, eliminate MoPac, the action will not be MoPac Company action, but rather that of T&M. Suffice it to say that the proposed merger is the subject of an agreement entered into by MoPac on the authorization of its Board of Directors, and that MoPac at least recognizes that its consummation, resulting in the elimination of MoPac, requires at least some action by its shareholders even though questioning the requisite needed for approval. We conclude that the agreement to consolidate entered into by MoPac constitutes company action by defendant MoPac within the meaning of paragraph 3 of Article VII D if such consolidation as proposed would result in the effects enumerated in paragraph 3(c) and (d).

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Thus, the ultimate question is whether the proposed plan of consolidation or merger involves "alter(ing) or chang(ing) the preferences, qualifications, limitations, restrictions and special or relative rights of the Class A Stock or of the Class B Stock" or amends or eliminates any of the provisions of paragraph 3 of Article VII D. If it does, separate majorities of both classes are required for approval by terms of the Articles of Association, adopted pursuant to the plan of reorganization of MoPac under Section 77 of the Bankruptcy Act, which plan was approved by the ICC on or about July 29, 1954 (290 ICC 477), approved by this Court on February 25, 1955, and confirmed by this Court on September 19, 1955.

Under applicable Missouri law, the voting requirements for adoption of the proposed plan are controlled by the Articles of Association of Missouri Pacific Railroad Company, RSMo 1959, § 351.270.

Further, under 49 U. S. C. A., § 5(11), a carrier's authority to merge or consolidate as approved by the ICC is conditioned on the assent "of a majority, unless a different vote is required under applicable state law, in which case the number so required shall assent, . . ."

The Class A and Class B shares of MoPac were issued pursuant to the aforesaid plan of reorganization.

The issued and outstanding capital stock of MoPac consisted, as of December 16, 1963, of 1,849,576 shares of Class A no par value stock and 39,731 shares of Class B no par value stock.

Defendant Mississippi owns 1,071,895 shares of Class A stock of MoPac, or about 57% of the number of shares of the entire issued and outstanding stock of MoPac.

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MoPac owns approximately 83.6% of the only class of issued and outstanding stock of The T&P.

Plaintiffs Slayton, Proskauer, Mendelsohn, Alfred L. Rose and Dorothy B. Rose are the owners of 260 shares of Class B common stock of MoPac.

Plaintiff Alleghany Corporation is the beneficial owner of in excess of 20,000 shares of Class B common stock of MoPac.

Plaintiff Empire Trust Company holds the shares of Class B common stock of MoPac, of which plaintiff Alleghany is the beneficial owner, as voting trustee for Alleghany.

Plaintiff Levin is the owner of 85 shares of Class B common stock of MoPac.

Class A shares of the reorganized company were issued to the preferred stockholders of the debtor corporation on the basis of one Class A share for each share of old preferred stock and one Class A share for each $100 of dividends accrued on the old preferred stock.

The Class B shares of the reorganized company were issued to the common stockholders of the debtor corporation on the basis of one share of Class B stock for each 20 shares of old common stock.

In approving the plan of reorganization, the ICC declared that since the Class A stock was issued to the preferred stockholders of the debtor corporation in the entire amount of the par value of their stock plus unpaid dividends, the Class A stock of the reorganized company should not participate in the earnings of the reorganized company beyond non-cumulative dividends not to exceed $5.00 per share in any one year and should not

participate in the assets of the reorganized company beyond $100 per share and further declared, in providing for the issuance of the Class B stock in the reorganized company to the common stockholders of the debtor corporation, that the Class B stock would be entitled to all residual earnings and assets after the limited participation provided for the Class A stock (290 ICC 477, pp. 598, 600).

The plan of reorganization as formally approved by the ICC directed:

> "The certificate of incorporation (of the reorganized corporation) shall permit the authorization from time to time of additional shares of common stock of either class, but shall specifically provide that the new company shall not alter or change the rights of holders of either class of stock or authorize the issuance of additional shares of either class or of any other class or of participating or convertible preferred stock, without the consent of the holders of not less than a majority of the number of shares of common stock of each class at the time outstanding." (290 ICC 477, p. 665.)

The preferences, qualifications, limitations, restrictions and special and relative rights of the Class A stock and the Class B stock, as provided by the Articles of Association of MoPac, as amended pursuant to the aforesaid plan of reorganization and as approved and directed by this Court, include the following:

Class A Stock. The Class A stockholders shall be entitled to receive, when and as declared by the Board of Directors, dividends in cash in an amount not exceeding $5.00 per share in any calendar year. Such dividends

shall be non-cumulative without regard to the availability in any calendar year of earnings or any other funds lawfully available for the payment of dividends. Dividends paid on the Class A stock shall not in any event exceed $5.00 per share in any calendar year. In the event of any liquidation or dissolution or winding up of MoPac, the Class A stockholders shall be entitled to receive, out of the assets of MoPac available for distribution to its stockholders, $100 per share together with any dividends declared and unpaid on the Class A stock.

Class B Stock. After full $5.00-per-share dividends upon the Class A stock to the end of any current calendar year have been paid, or declared and a sum sufficient for the payment thereof set apart for such payment, the Class B stockholders shall be entitled to receive such dividends, without restriction as to amount, as may be declared by the Board of Directors from any funds lawfully available therefor. In the event of any liquidation or dissolution or winding up of MoPac, the Class B stockholders shall be entitled, to the exclusion of the Class A stockholders, to receive all the assets of MoPac remaining after satisfaction of the claims of the Class A stockholders as aforesaid.

Under the proposed plan of consolidation, each Class A and each Class B share of MoPac would be exchanged for four shares of $25 par value common stock of the consolidated company and each share of the T&P would be exchanged for four shares of $25 value common stock in the consolidated company.

The proposed consolidation (under which Class A shares, entitled to dividends limited to $5.00 per year and to $100 per share on liquidation or dissolution to

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$100 per share, and under which Class B shares, entitled after payments of Class A $5.00 dividends to unrestricted dividends, save as they are declared by the Board of Directors, and upon liquidation or dissolution, entitled to receive all assets remaining after satisfaction of Class A claims, are both to be exchanged for identical common shares of a new company) seems so plainly and obviously to alter and change the preferences, qualifications, limitations, restrictions and special and relative rights of the Class A and the Class B shares as not to require discussion. It matters not to whose advantage the plan accrues nor whether the plan be fair or unfair. The question is whether the two classes' relative rights, restrictions and limitations are to be altered and changed. It is patent that alteration and change of relative rights, preferences and limitations and restrictions in respect to dividends and upon dissolution are inherent in the plan for the exchange of the two classes of stock for identical common stock in the proposed new company. We draw such a conclusion without regard for the graphically demonstrated financial effect of the exchange contemplated:

As of September 30, 1963, the consolidated net assets of MoPac were $394,721,242. The equity of the Class A stock in such assets, limited to $100 per share, was $184,957,600 or 47% of the total. The remaining equity of $209,763,642, constituting 53% of the total, accrued to the Class B stock, equivalent to $5,280 per share.

Consummation of the proposed plan would, as at September 30, 1963, give to the holders of the Class B stock of MoPac, in exchange for their Class B stock, common stock of the consolidated corporation having an equity value of $7,917,594 (the equivalent of $199 per share of

Class B stock), or 2% of the total, in the consolidated corporation, and would give to the Class A stockholders of MoPac, in exchange for their Class A stock, common stock of the consolidated corporation having an equity value of $368,523,721 (the equivalent of $199 per share of Class A stock), or 94.6% of the total (the remaining 3.4% going to the minority stockholders of the T&P), in the consolidated corporation.

Consummation of the proposed plan not only would change the present relative participation in equity of the Class A and Class B stockholders in MoPac from 47% to 53%, respectively, to 98% and 2%, respectively, in the consolidated corporation, but also would destroy the Class B stockholders' constantly accruing percentage increase of the total equity and fix the relative equity participation of the Class B stockholders in the corporate enterprise permanently at 2%.

The plan of consolidation, if consummated, will result in the elimination of MoPac. Hence, we conclude also that such elimination of MoPac will obliterate the provisions of paragraph 3 of Article VII, Section D, which, thus, will require for approval a majority of the number of Class A shares of MoPac and a majority of the number of Class B shares of MoPac as provided by Article VII, Section D, Paragraph 3(d).

It, therefore, follows that defendants' motions to dismiss as they relate to class voting rights on the proposed plan of consolidation will be overruled. Decision on all other issues raised by the motions to dismiss will be reserved.

Dated this 13th day of July, 1964.

JAMES H. MEREDITH,
United States District Judge.

APPENDIX D

The Judgment Appealed From

* * *

(Judgment)

United States Court of Appeals

FOR THE EIGHTH CIRCUIT.

No. 17,836. September Term, 1965

Mississippi River Fuel Corporation, William G. Marbury, Glenn W. Clark, D. B. Jenks, Sam B. Cook, James Lee Johnson, C. D. Peet, John C. Bolinger, Jr., James M. Kemper, Jr., and Missouri Pacific Railroad Company,
Appellants,

vs.

Rose Slayton, Joseph M. Proskauer, Walter Meldelson, Alfred L. Rose and Dorothy B. Rose; Alleghany Corporation, and Empire Trust Company, a corporation, as Voting Trustee; and Betty Levin.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the Order of the said District Court appealed from in this cause be, and the

same is hereby, reversed with costs; and that Mississippi River Fuel Corporation, William G. Marbury, Glenn W. Clark, D. B. Jenks, Sam B. Cook, James Lee Johnson, C. D. Peet, John C. Bolinger, Jr., James M. Kemper, Jr., and Missouri Pacific Railroad Company, have and recover against Rose Slayton, Joseph M. Proskauer, Walter Mendelson, Alfred L. Rose and Dorothy B. Rose; Alleghany Corporation, and Empire Trust Company, a corporation, as Voting Trustee; and Betty Levin, the sum of Six Hundred Eighty-nine and 62/100 ($689.62) Dollars for their costs in this behalf expended, and have execution therefor.

And it is further Ordered by this Court that this cause be, and it is hereby, remanded to the said District Court for further proceedings not inconsistent with the Opinion of this Court this day filed herein.

April 19, 1966.

APPENDIX E

COMPARABLE STATE STATUTES AND RAILROAD CHARTERS

1. In addition to Missouri, the following states, *inter alia*, have statutes which make requirements for a class vote in the case of a merger controlling when such requirements are contained in the railroad corporation's charter:

> Arkansas (Ark. Bus Corp. Act §64-703); Florida (Fla. Gen. Corp. Act §608.20); Kansas (Kans. Gen. Corp. Code §17-2803); Louisiana (La. Corp. Law §12-48); Maryland (Md. Gen. Corp. Law §66); New York (N. Y. Bus Corp. Law §§616-617); North Carolina (N. C. Bus Corp. Act §55-108); Texas (Tex. Bus Corp. Act §5.03); Utah (Utah Bus Corp. Act §§16-10-136); Vermont (Vt. Gen. Corp. Law §3-162, Vt. Pub. Serv. Law §30-1103); Virginia (Va. Corp. Law §§13.1-12, 13.1-13).

2. Of the railroads whose shares are listed on the New York Stock Exchange, the following have charter provisions requiring a class vote on a merger:

> Chicago & N.W.*; Chicago & E. Ill.**; Chicago, R.I. & P.; Chicago, Milwaukee & St. P.*; Kansas City So. Inds., Inc.

3. The statutes of the following States contain requirements for approval of railroad mergers solely in terms of a special majority of each class of stock and contain no provision at all for any vote of all the stock in the aggregate:

> California (24 Calif. Code Anno. §4107); Michigan (Mich. Pub. Util. Law §22.233, Mich. Gen. Corp. L. §450.52); until Sept. 1, 1964, New York (N.Y.R.R.L. §141).

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* The indicated railroads have recently filed merger applications with the ICC, in which each of them recited its compliance with such requirements. (See *supra*, pp. 21-22.)

** In a recent ICC proceeding, the hearing examiner deemed this provision binding in case of a merger. (See *supra*, p. 20.)